Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

PHILLIP R. PUMMELL,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Herbert Creech, Jr.
1422 Chapel Street
Dayton, Ohio 45404
(513) 228-1086

Counsel for Petitioner

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STATEMENT OF QUESTIONS INVOLVED

I. How federal courts are to define and apply the concept of a "judicial trial" contained within the United States Constitution's prohibition against Bills of Attainder, with specific reference to the fact that said prohibition is violated by the United States Sentencing Guidelines.

II. Whether the United States Sentencing Guidelines were promulgated in a maner violative of the Presentment Clause of the United States Constitution.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

No._____

PHILLIP R. PUMMELL,
Petitioner

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Phillip R. Pummell petition for a writ of certiorari to review the judgment of The United States Court of Appeals for the Sixth Circuit.

CITATION TO OPINION BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit was not published but is succinct and is attached hereto and incorporated herein by reference and is labeled Appendix A. (App. 1a)

JURISDICTIONAL GROUNDS

The Opinion of the Court of Appeals was issued March 17, 1995 and mandate on April 10, 1995. Jurisdiction is invoked per 28 U.S.C. § 1257(3) in that petitioner was deprived of rights secured to him by the United States Constitution, *see also*, 28 U.S.C. § 1254(1), 2101(c) and the Rules of this Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED

1. "No Bill of Attainder or ex post facto law shall be passed, "Article I, section 9, United States Constitution.
2. "Every Order, Resolution, or Vote to which the concurrence of the Senate and House of Representatives may be necessary ... shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, ...," Article I, section 7, United States Constitution.

BASIS OF FEDERAL JURISDICTION IN THE FIRST INSTANCE

It was alleged that petitioner violated 18 U.S.C. 844(i).

STATEMENT OF THE CASE AND FACTS

On January 16, 1993, a complaint was filed against the petitioner in the United States District Court for the Southern District of Ohio at Dayton charging him with violations of 18 U.S.C. § 373 and 844(i) with regard to a

conspiracy to destroy a public building by a bomb. A bond was set and an indictment followed on February 8, 1993. On August 3, 1993, pursuant to plea negotiation, petitioner pleaded guilty to violating 18 U.S.C. § 844(i) and 2. The parties then began exchanging memoranda concerning certain Constitutional issues, all of which were ruled on in favor of the government. On April 28, 1994, petitioner was sentenced, pursuant to the applicable statute and the United States Sentencing Guidelines (hereinafter "Guidelines"), to twenty-four months actual incarceration, a one thousand dollar fine, a fifty dollar special assessment and three years of supervised release with conditions. A timely appeal was taken from this sentence to the United States Court of Appeals for the Sixth Circuit wherein petitioner raised four arguments of a Constitutional nature, all of which were again ruled on in favor of the government in a judgment delivered on March 17, 1995. In this petition for certiorari, petitioner seeks review in this Court of two of those Constitutional issues.

REASONS FOR GRANTING THE WRIT

1. To give this Court the opportunity to define what constitutes a "judicial trial" within the context of the Constitution's prohibition against "Bills of Attainder" and to explain how the "Guidelines" deprive persons of a complete judicial trial and thus violate the Bills of Attainder prohibition.

2. To give this Court the opportunity to more clearly define the scope of the President's responsibilities, and the limits on the power of the Congress, under the Presentment clause of the United States Constitution.

ARGUMENT

Issue I. How Federal Courts are to define and apply the concept of a "Judicial Trial" contained within the United States Constitution's Prohibition against Bills of Attainder, with specific reference to the fact that said prohibition is violated by the United States Sentencing Guidelines.

Article I, Section 9 of the United States Constitution prohibits Bills of Attainder. These Bills legislatively find guilt and inflict punishment without benefit of a judicial trial. In lieu of a lengthy history essay here, suffice it to say that the two cases relied on by the government regarding this matter adequately sum up these requirements, discussing history and law at length. In order to transgress the Constitutional prohibition against Bills of Attainder, the action of the legislature must do three things: first, find, determine or establish guilt; second, inflict punishment upon an identifiable individual; and third, do so without provision for the protections afforded by a judicial trial, *Selective Service v. Minnesota Public Interest Research Group*, 468 U.S. 841 (1984), *Nixon v. Administrator of General Services*, 432 U.S. 425 (1977). Perhaps because there is little reason to doubt that the United States Sentencing Guidelines (hereinafter "Guidelines") determine guilt and inflict punishment, the government in the Courts below apparently conceded these two requirements of a Bill of Attainder and focused instead upon the last requirement, that of a "judicial trial" and its protections, in order to save the Guildelines from this Constitutional infirmity. The government and Courts below seemed to think that

the "judicial trial" requirement is satisfied because the Guidelines are administered by Courts. More penetrating analysis, however, makes it clear that the Guidelines do deprive an accused of a judicial trial and surely inflict prohibited "legislative punishment, " *see, Nixon, Supra*, at 475.

Exploration of the most fundamental nature of a judicial trial is important ot clearly understand this issue. It is said that a trial is:

> "... all proceedings from the time when the parties are called to try their case in court or from the time when issue is joined to the time of its final determination." Webster's Third New International Dictionary, Unabridged, G. and C. Merriam Co., Springfield, Massachusetts, p. 2439, def. 2(b) (1981) ed.).

And, a trial is:

> "In its most comprehensive sense in reference to a criminal prosecution, inclusive of all proceedings down to the acquittal or conviction of the accused." Ballantine's Law Dictionary, Third Edition (1969).

Furthermore, given proper jurisdiction, a trial is "all the steps taken in the case from its submission to the Court or jury to the rendition of the judgment," 88 *C.J.S., Trial, section* 1, p.19 (citing far too many cases from many jurisdictions to mention here).

Indeed, "the term 'trial' contemplates a final disposition of the controversy, ... and, when once commenced, a trial does not end until the examination or investigation is

completed and a judgment can be entered. A trial is not concluded as long as any phase of the case is open for consideration," 88 *C.J.S., Trial, section* 2, P.21(citing far too many cases from too many jurisdictions to mention here). In a criminal case, the final act or determination or judgment, the end of the trial process, is, or course, the sentence itself. *See also*, 75 *American Jurisprudence* 2d, *Trial, sections* 1-5 (with far too many citations to mention here). The Guidelines are not analogous to just a set of indeterminate sentences as might be suggested. They are clearly a direct legislative infringement on the judicial trial process itself. Courts are not told, for example, that persons may be sentenced for a period of from one to ten years for doing a particular crime or kind of crime. But, between the onset of a judicial trial (say, the indictment) and its conclusion (say, the sentence), the legislature intrudes with Guidelines which are no more than a manual of exactly how the legislature wants to, and does, interfere with the process prior to its completion. The intrusion is positively surgical in its preciseness, which is why its insidious sublety escapes notice so easily. The integrity of the judicial process from indictment to sentence, from "A" to "Z", from Alpha to Omega is arbitrarily profaned in a very dangerous way by the present Guidelines System. Guilt or innocence, and some management of the case, through the first phase of fact-finding concerning guilt, is still done by the Court, but then prior to the case's end, the final pronouncement of sentence, the legislature presents the Court with a mandatory manual on how to bring the matter to its final conclusion, that is, how to sentence the accused. There is no significant role for the Judge or the jury to play here, on what, surely in the eyes of the accused, is absolutely

the most important part of the case - whether he goes out one door or through another. But, neither Judge nor jury can help him now: they have been denigrated to the level of first tier fact-finders for his real antagonist, surely not the kind of "judicial trial" process that would be recongnized by countless generations of legal students of what was once called Anglo-Saxon jurisprudence, and which is a terrible thing to lose.

Clearly, the Guidelines contain all other historical antecedents of the Bill of Attainder, and the destruction in their wake of the protection of the judicial trial, here demonstrated, must cause them to be invalidated for all time. Here, this Court has not only a precious opportunity to re-establish in federal jurisprudence the sacred nature of the judicial trial *per se*, in all of its simple elegance, but also to send the various States a "signal" not to experiment with totalitarian codes in the name of law and order.

Issue II. Whether the United States Sentencing Guildelines were promulgated in a manner violative of the Presentment Clause of the United States Constitution.

In the case of *U.S. v. Perez*, 685 F. Supp. 990 (W.D. Texas 1988), it was held that the United States Sentencing Guildelines violate Article I, section 7, of the United States Constitution in that their enabling legislation did not require their presentation to the President for signature (or veto) before they became effective. Even though now discredited by virturally all (if not all) the Circuits, it is suggested that the reasoning in the *Perez* case still presents the better rule and that its adoption by this Court would return sentencing to the judicial trial

process, advance judicial enonomy in an overloaded federal system, honor the Presentment clause, *see*, *INS v. Chandra*, 462 U.S. 919 (1983), prevent the wrongness of imprisoning first offenders, *see, Mistretta v. U.S.*, 488 U.S. 361 (1989), prevent the courts from being bound by statutes that are contrary to their enabling legislation, *see*, *U.S. v. Larionoff*, 431 U.S. 864 (1977), more clearly reflect Congressional intent, *see*, *Chevron USA v. NRDC*, 467 U.S. 837 (1984), and end the anomaly of administrative rules (Guidelines) making mandatory what statutes of the land make discretionary) sentencing after judicial trials), *U.S. v. Owens*, 901 F2d 1457 (8th Cir. 1990).

CONCLUSION

Therefore, based upon the arguments presented herein, this Court should grant this petition for the writ of certiorari and order forthwith a briefing schedule on the merits of this case.

Respectfully submitted,

By: /s/ Herbert Creech, Jr.
Attorney for Petitioner
1422 Chapel Street
Dayton, Ohio 45404
(513) 228-1086

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH COURT

No. 94-3511

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PHILLIP R. PUMMELL,
Defendant-Appellant

BEFORE: BROWN, NORRIS and SUHRHEINRICH, Circuit Judges.

ORDER

Phillip R. Pummell appeals his judgment of conviction and sentence. The parties have expressly waived oral argument, and this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

In August 1993, Pummell pleaded guilty to attempting to damage and destroy property by means of an explosive, in violaiton of 18 U.S.C. § 844(i). The court sentenced him to twenty-four months of imprisonment, three years of supervised release, and imposed a $1000 fine and a $50 special assessment.

On appeal, Pummell argues that: 1) the sentencing guidelines constitute a bill of attainder; 2) the sentence imposed constitutes cruel and unusual punishment in violation of the Eighth Amendment; 3) the sentencing guidelines violate the Presentment Clause of the Constitution; and 4) the district court erred in sentencing him by overlooking his numerous objections to the presentence investigation report, attempting to send an improper message to minorities due to the nature of his offense, determining that he is a violent offender, and because he was only convicted of an attempt. He also argues that he was denied equal protection under the Armeed Career Criminal Act.

Upon review, we affirm the judgment of conviction and sentence. Pummell's argument that the sentencing guidelines constitute a bill of attainder is without merit as the guidelines do not legislatively determine guilt, nor do they permit the imposition of punishment without the protection of a trial. *See Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 846-47 (1984); *see also United States v. Bennett*, 928 F.2d 1548, 1557-58 (11th Cir. 1991). In addition, the sentencing guidelines to not unconstitutionally divest trial courts of their sentencing descretion. *See Mistretta v. United States*, 488 U.S. 361, 367-68 (1989). Moreover, the sentencing

gurdelines do not violate the Presentment Clause of the Constitution because the President has signed the enabling legislation for the guidelines. *See United States v. Barnerd*, 887 F.2d 841, 842 (8th Cir. 1989) (per curiam); *but see United States v. Scampini*, 911 F.2d 350, 352-53 (9th Cir. 1990) (the President's signature on the enabling legislation is not dispositive of this issue, upholding constitutionality of guidelines on other grounds). Pummell's sentence of twenty-four months of imprisonment does not constitute cruel and unusual punishment as it is not grossly disproportionate to his crime. *See United States v. Warren*, 973 F.2d 1304, 1311 (6th Cir. 1992). Finally, the district court properly sentenced Pummell to twenty-four months of imprisonment as he was not entitled to a downward departure, *see United States v. Pickett*, 941 F.2d 411, 417 (6th Cir. 1991); *United States v. Davis*, 919 F.2d 1181, 1187 (6th Cir. 1990), and the district court properly overruled his objections to the presentence investigation report. Moreover, the sentencing guidelines clearly envision imprisonment as a form of punishment for a defendant convicted of an attempt. *See* USSG §2X1.1; *United States v. Holmes*, 975 F.2d 275, 283 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1322 (1993). Therefore, Pummell's equal protection argument fails.

Accordingly, we **AFFIRM** the district court's judgment of conviction and sentence.

ENTERED BY ORDER OF THE COURT

BY: /S/ LEONARD GREEN, CLERK